United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2207

To be argued by
HARRY C. BATCHELDER, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2207, 74-2208, 74-2209, 74-2210, 74-2423

B
P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

DAVID ROSS MILEY, JOSEPH RAYMOND WENZLER, MARVIN THOMAS GOLDSTEIN, DEAN PETER VAVARIGOS, DAVID FLORES,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Ross Miley, Joseph Raymond Wenzler, Marvin Thomas Goldstein, Dean Peter Vavarigos and David Flores appeal from judgments of conviction entered September 13, 1974, in the Southern District of New York following two jury trials in May and June, 1974, before the Honorable Milton Pollack, United States District Judge.

Indictment 74 Cr. 188, filed on February 21, 1974, charged William Gil Brandt, II, David Ross Miley, Joseph Raymond Wenzler, Marvin Thomas Goldstein, Dean Peter Vavarigos, Robin Bachia, John Godinsky, Jan Lang and

David Flores in Count One with conspiracy to distribute Schedule I and II controlled substances. Title 21, United States Code, Section 846. Count Two charged Brandt, Miley and Godinsky with the distribution of 1000 dosage units of lysergic acid diethylamide ("L.S.D."). Count Three charged Brandt, Flores and Vavarigos with the distribution of 27.11 grams of phencyclidine hydrochloride ("P.C.P."). Count Four charged Brandt, Miley and Godinsky with the distribution of 3850 dosage units of L.S.D. Count Five charged Brandt, Lang and Wenzler with the distribution of 4070 dosage units of L.S.D. Count Six charged Brandt, Miley, and Bachia with the distribution of 1800 dosage units of L.S.D. Count Seven charged Bachia with possession of 10,000 dosage units of L.S.D. with intent to distribute. Count Eight charged Goldstein with possession of 4,000 dosage units of L.S.D. with intent to distribute. Count Nine charged Joseph Raymond Wenzler with possession of 295 tablets containing L.S.D. with intent to distribute.

On April 29, 1974, Brandt pled guilty to Counts 1 and 3, Godinsky pled guilty to Counts 1 and 2, and Bachia pled guilty to Counts 1 and 6.* Trial commenced against all other defendants except Lang, who was then a fugitive. On May 7, 1974, the jury found Joseph Raymond Wenzler guilty on Count Five and acquitted David Ross Miley on Count Two. On May 8, 1974, Judge Pollack, on motion of all defense counsel, declared a mistrial on the other charges. Trial commenced again on June 17, 1974, and

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* On June 16, 1974, imposition of sentence on Godinsky was suspended and he was placed on two years probation as a Youth Offender. On September 9, 1974, Brandt was sentenced on Count Three to nine months imprisonment, to be followed by two years special parole; imposition of sentence on Count One was suspended and a two year term of probation imposed, to run concurrently with the special parole term. On October 16, 1974, after commitment for study under 18 U.S.C. § 4208(c), imposition of sentence on Bachia was suspended, and he was placed on probation for three years.

on June 21, 1974, the jury found all defendants guilty as charged. On September 9, 1974, David Flores was committed for study pursuant to 18 U.S.C. Section 4208(c). Marvin Thomas Goldstein was sentenced to concurrent terms of six months imprisonment on Counts One and Eight, to be followed by two years special parole. David Ross Miley was sentenced to concurrent terms of two months imprisonment on Counts Four and Six, followed by two years special parole; imposition of sentence was suspended on Count One, and Miley was placed on two years probation to run concurrently with the special parole term. Dean Peter Vavarigos was sentenced to three months imprisonment on Count Three to be followed by a two year special parole; imposition of sentence on Count One was suspended and Vavarigos was placed on two years probation, to run concurrently with the special parole term. Joseph Raymond Wenzler was sentenced to concurrent terms of four months imprisonment on Counts Five and Nine, to be followed by two years special parole; imposition of sentence on Count One was suspended, and Wenzler was placed on two years probation to run concurrrently with the special parole term.

Miley has served his sentence; all other appellants are on bail pending appeal.

Statement of Facts

The Government's Case

Early in November, 1973, Michael Starbuck, an informant, met with William Brandt and discussed with him the possibility of purchasing 100 pounds of marijuana and L.S.D. (33, 35).* On November 23, 1973, Starbuck met

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* Parenthetical references unless otherwise noted are to minutes of the second trial on June 17 through June 21, 1973. Minutes to the first trial will be referenced as (FT ..); Minutes of the Wenzler and Goldstein suppression hearings will be noted as (WS ..) (GS ..).

with Brandt and David Miley at their apartment in the Village Plaza Hotel and negotiated to buy 1000 units of L.S.D. for $650 with delivery to be arranged in the future by John Godinsky (40). Brandt gave Starbuck a sample which Starbuck turned over to Special Agents Robert Palombo and Robert Nieves on November 27, 1973 (182, 372; GX 1).

Plans were made to purchase the 1000 units from Brandt and Miley on the evening of the 27th (42). On that evening Starbuck introduced Nieves to Brandt, Miley and John Godinsky in apartment 103 of the Village Plaza Hotel (43, 185). Godinsky coutned out ten sheets of blotter paper with 100 dots of L.S.D. on each sheet (43, 186; GX 5). Nieves, at Brandt's direction, paid $650 to Brandt, who gave $180 or $200 to Godinsky (43, 187). Nieves asked about larger quantities of L.S.D. at a more reasonable price, and Brandt stated that if Nieves purchased gram quantities the price would be $1400 a gram with the price reduced to $1250 per gram if the purchase was in excess of three grams (198). Brandt, Miley and Godinsky vouched for the quality of their L.S.D., stating that it was the best available (188). Brandt then brought up T.H.C., saying that he could obtain it in ounce quantities for $1800 an ounce. Nieves agreed to get back to Brandt for the possible purchase of T.H.C. (188-9).

On December 5, 1973, Starbuck met with Brandt and Jan Lang at the Village Plaza Hotel, and the three then went to Lang's apartment at 1st Avenue. Brandt and Lang offered Starbuck an ounce of T.H.C. (Tetrahydracannabinol) for $1800 (43-54). Lang gave Starbuck a sample of the T.H.C., and it was agreed that the purchase would be made in the near future (45). On December 7, 1973, Starbuck gave the T.H.C. sample to Palombo (GX 2; 45, 374).

On December 13, 1973, Starbuck, accompanied by Nieves, introduced Palombo to Brandt as his 'Cousin Sammy" (46, 193, 375). Brandt then took Starbuck, Palombo and Nieves to 501 East 11th Street, where Brandt and Starbuck went to the apartment of David Flores and met with Flores and Dean Vavarigos (46, 193-4, 376). After discussing with Brandt how the deal would go, Brandt, Flores and Vavarigos agreed to allow one person to come up and make the deal (46-7). Starbuck left and returned with Nieves (197). Nieves arrived, weighed the drugs, which were resting on a scale, and paid Brandt $1800 for the alleged T.H.C. (47-8, 197).* Brandt, in turn, counted out a sum of money which he gave to David Flores with the comment "12 right" (48, 199). During the ensuing conversation, Vavarigos told Nieves that the T.H.C. could be cut with lactose and that he could supply gelatin capsules for packaging (48, 197-8). Vavarigos also guaranteed that the package contained 3000 dosage units of T.H.C. (198).

On December 17, 1973, Starbuck met with Brandt at the Village Plaza and Brandt, because he was busy, told Miley to take Starbuck to Queens to meet Vavarigos, which Miley did (50). With Miley present, Vavarigos stated he had a kilo of cocaine which he wanted to sell but because the package was not his he would only sell ⅛th of a pound or ¼th of a pound (50-1). Vavarigos then gave Starbuck a sample of the cocaine (50; GX 3).

On December 18, 1973, Vavarigos made a phone call, which was recorded, to discuss with Nieves the T.H.C. Vavarigos, Flores and Brandt had sold to him (201-202). During the conversation Nieves stated the substance he received was P.C.P. (phencylidine hydrochloride) not T.H.C. Vavarigos hotley denied this.

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* A laboratory test shortly thereafter established that the T.H.C. was in fact "P.C.P." (phencyclidine hydrochloride—a horse tranquilizer (200)).

"No, I know what it is man, I've been doing this stuff a long time" [GX 7A, p. 2].

* * * * *

Vavarigos also said that Nieves should make every effort to sell more to help Vavarigos out of financial difficulty by moving some more of the drug for him [GX 7A, pp. 4, 6, 15].

* * * * *

"I'm telling you man, you're buying yourself a piece of the future, you know."

Vavarigos also discussed with Agent Palombo the quality of the cocaine sample he had given to Starbuck and made arrangements to sell a pound of the cocaine for $17,000. In discussing the individuals involved in this cocaine transaction, Vavarigos stated:

. . . This is going through so many people, you, Bobby, Mike, Billy, . . . David and then to me.

* * * * *

Palombo: I mean there could be a string of guys, but, I, I, I know.

Vavarigos: Way too many.

* * * * *

Palombo: So I think it's, we're talking about the B guy, Billy Boy is trying to make the score of the century.

Vavarigos: Alright, it's not only Billy, it's, it's, not only Billy either, because Billy, has uh has met me through somebody else who has to be taken care of too (GX 7A pp. 9, 11). It was agreed that Palombo and Nieves would get back to Vavarigos (GX 7A, p. 20).

On January 2, 1974, and January 3, 1974, Palombo called Vavarigos to firm up the price on the pound of cocaine. They agreed that the price would be $16,000 and that Vavarigos would only sell the whole package (GX 15A and 16A).

On January 3, 1974, Nieves called Brandt, who said he had 3850 dots of L.S.D. available for 50 cents each (204). Palombo and Nieves then journeyed to the Village Plaza Hotel, Room 103, where they were admitted to Brandt's room and met Miley and Godinsky (205, 382). Godinsky took 1350 dots (GX 8) out of a book and received $675 from Nieves. Nieves asked how long it would be before he could receive the remainder; Godinsky replied that he would check with his connection as to the remaining 2500 and would be back in an hour. Palombo and Nieves left, agreeing to come back at 7:15 P.M. (205, 383). When they returned at 7:15, Miley, who informed them that Brandt was out running errands, said Godinsky would call if he had the L.S.D. (205-6, 383). Soon Brandt returned and, after receiving a phone call, said that Godinsky had obtained the additional 2500 dosage units and would be right over (206, 383). Godinsky arrived with the 2500 dosage units, and Nieves gave Brandt $1250 (206, 383, GX 8). During the ensuing conversation, Brandt told Palombo that Godinsky was leaving for California and that Brandt would now be dealing directly with Godinsky's supplier, Robin Bachia, a/k/a "Strider" (384). After Nieves and Palombo departed, Special Agent Paul Sennett saw John Godinsky leave the Village Plaza Hotel in a car with Robin Bachia and proceed to the Bowery and East 4th Street, where Bachia got out (527). Marvin Goldstein lived at 56 East 4th Street, three doors away (503, 230).

On January 4, 1974, Starbuck met Brandt again with with Jan Lang and discussed the purchase of a new type of L.S.D. known as "purple haze". Starbuck received a sample of the purple haze from Brandt, and it was agreed

that the price for an ounce would be $1800 (51; GX 4). Starbuck turned the sample over to Agent Nieves (52).

On January 8, 1974, Palombo called back to Vavarigos, and it was agreed the pound of cocaine would be delivered by Vavarigos on that date (GX 16A). Palombo and Nieves met with Vavarigos on January 8, 1974, and January 10, 1974, and showed $16,000, but Vavarigos was unable to deliver the cocaine (207-210, 385-389). During the meeting on January 10, 1974, Vavarigos gave an additional sample of alleged T.H.C. and asked Palombo and Nieves to see if they could obtain buyers for it (211, 389; GX 9).

On January 15, 1974, Starbuck delivered the sample of "purple haze" L.S.D., which he had received from Brandt and Jan Lang, to Nieves (54, 214-5, 390). Later that day Starbuck introduced Palombo and Nieves to Jan Lang, who was with Brandt in Brandt's store (390). Lang stated he could only bring two people to his "connection", so Palombo and Nieves accompanied Lang to Apartment 5, 416 East 9th Street, where they were introduced to Joseph Wenzler (215-6, 391). Wenzler stated the L.S.D. was available but that he would require the money out front. When this was refused, he stated the deal would be done in two parts of 2,000 dosage units. This was done, and Wenzler received $1200 for the L.S.D. (216-217, 392; GX 10).* Palombo and Nieves inquired about additional amounts of the drug, and Wenzler said he could supply them but would need some notice (217, 392). Nieves and Palombo then returned to Brandt and Miley's store at 224 East 10th Street, where in the presence of Miley, Brandt and Starbuck, Brandt received $200 for his part in arranging the deal with Lang and Wenzler (55, 392).

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* GX 10—the 4070 purple tablets which the agents bought from Wenzler, are identical to GX 4, which was the sample of "purple haze" given by Brandt to Starbuck at the meeting in Lang's apartment between Starbuck, Brandt and Lang on January 4, 1974 (51-2).

On February 6, 1974, Nieves and Palombo met briefly with Miley, who lead them to Brandt in a comic book store which he and Miley were to soon open (220, 393). In the ensuing conversation, Brandt agreed to deliver 50,000 dosage units of L.S.D. for $16,500 and stated the L.S.D. was on its way (220, 393-4). Brandt said his supplier, Bachia, would not meet with anyone until the day of the deal (221). Palombo told Brandt he and Nieves were only interested in purchasing the same type of L.S.D. on blotter paper that was previously purchased from Godinsky. Brandt stated it would be good L.S.D. and from the same source as the prior occasions (394). It was agreed that Brandt would give 24 hours notice prior to the deal (221, 394).

On February 13, 1974,* Agents Palombo and Nieves met with Miley and Brandt at Brandt and Miley's new residence at 224 East 10th Street, which doubled as a comic book store (221, 395). It had been agreed beforehand that, as a token of good faith to Bachia, Palombo and Nieves would first have to purchase 2000 dosage units for $660 (395). On the agents' arrival, Brandt or Miley said the deal was set to go, but Bachia had not arrived (223-4, 396). While waiting for Bachia, Miley stated Brandt and he were opening up a new store and if it were not for the prior L.S.D. deals, he and Brandt would not have the money for such an undertaking (396). When Bachia did not appear, Brandt dispatched Miley to bring him to the store (226, 396). About fifteen minutes later, Bachia arrived with 1800 dots of L.S.D. of the same type delivered by Godinsky and was paid $660 (227, 396-397; GX 11). Bachia said he wanted to see the money for the 50,000 dosage units, and he went to the agents' car and counted it (227-8, 397-8). Strider then requested the

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* Portions of the events of this date were recorded on a KEL Recorder strapped to the body of Special Agent Palombo and played to the jury (GX 19A).

money be broken into $3300 lots and said the deal would go down in 10,000 dosage unit installments (229-398). Bachia added that the deal would not take long, as his connection was right in the neighborhood (228-398). By agreement Palombo and Nieves then drove Bachia to his source's block and instructed the agents to park on the East side of Bowery looking north and to await his return (228-9, 398). At this time Bachia walked East on 4th Street and was lost from Palombo's and Nieves' view. About ten minutes later surveillance officers saw Bachia leave 56 East 4th Street,* the premises of Marvin Goldstein, and return to the car occupied by Palombo and Nieves (531, 534).

On his return, Bachia said his source had sold 40,000 dosage units the day before and he had only obtained 10,000 units. As the car proceeded towards Brandt's and Miley's store, Nieves and Palombo placed Bachia under arrest (229-398-99). The agents seized from Bachia 100 sheets of blotter paper, wrapped in aluminum foil and containing L.S.D., identical to that previously delivered on that date and identical to that delivered by Godinsky on the prior occasions (GX 12).

Bachia was advised of his rights and soon thereafter took the agents to 56 East 4th Street, where he had a discussion with Marvin Goldstein in the doorway (230-399). Surveillance had seen no one enter or leave the premises of 56 East 4th Street since Bachia departed (536). After a short discussion between Bachia and Goldstein, Palombo and Nieves gained entry to the apartment after Goldstein slammed the door on Nieves' arm. Goldstein was then arrested (230-399). After Goldstein

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* A sign over Goldstein's store-front apartment read "Shesh Pesh" (534), and the apartment was commonly referred to at trial by that name.

was advised of his constitutional rights and executed a consent to search form, Palombo and Nieves seized, from a low shelf in the apartment, 4000 dosage units of L.S.D. on blotter paper. The agents also found part of the money that they had previously paid Bachia concealed under Goldstein's mattress. The L.S.D. was wrapped in the same manner as the units sold by and seized from Bachia earlier that day and contained L.S.D. of the same type delivered by Godinsky on the two previous sales and seized from Bachia on that date (220, 400-402; GX 12, 13, 18).

Later that day in the evening Joseph Wenzler was placed under arrest in his apartment, where he sold 4070 dosage units on January 15, 1974 (217, 237-9). After advising Wenzler of his rights and obtaining an oral consent to search, the agents seized from a night table drawer 284 "purple haze" L.S.D. tablets, identical to the type sold on January 15th, and given as a sample on January 4th (240, 509; GX 20).

The Defense Case

None of the defendants offered any evidence.

ARGUMENT

POINT I

Goldstein's suppression motion was correctly denied.

A. Introduction

Prior to trial Goldstein moved to suppress all evidence seized from his apartment after his arrest on February 12, 1974. The trial court conducted a suppression hearing out of the presence of the jury and denied Goldstein's motion to suppress. On appeal Goldstein claims that his arrest

was without probable cause and also unlawful because the agents had no warrant. He also asserts that his consent to the search was involuntary and that the search was in any event illegal because it arose from his illegal arrest. These contentions are without merit.

B. The hearing * below

On February 12, 1974, Robert Bachia sold 1,800 dots of L.S.D. to Agent Nieves. Agent Nieves arrested Robert Bachia in possession of 10,000 dots of L.S.D. (GX 4).* The arrest followed undercover activity by Nieves pursuant to which it was arranged that Bachia would deliver to Nieves 50,000 dots or units of L.S.D. (GS 4). After Bachia was advised of his rights he said that he wanted to cooperate with the agents and that he had received the L.S.D. from a person named Mel who lived at 56 East 4th Street (GS 4, 26-27). A few minutes before Bachia was arrested by Nieves, Agent Sheehan, who was doing surveillance work, saw Bachia leave 56 East 4th Street (GS 45).

After going to look for Mel at a snack bar, Nieves, Sheehan and other agents, along with Bachia, went to 56 East 4th Street (GS 4). Bachia described Mel to Nieves (GS 5), then knocked on the door at 56 East 4th Street while Nieves stepped aside (GS 5). After Bachia knocked, Goldstein came to the door and opened it a few inches (GS 5). At this point, Nieves recognized Goldstein as "Mel" from the description Bachia had previously given (GS 5). Nieves then approached the door, informed Goldstein that he was a federal agent, and stated that Goldstein was under arrest (GS 6). Goldstein's response was to

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* References to the suppression hearing testimony will be made by the letters "GS". Two witnesses testified at the hearing: Agent Nieves and Agent Sheehan.

slam the door on Nieves' hand (GS 5). Nieves and the other agents were finally able to force the door open, subdue Goldstein and handcuff him (GS 6, 33).

Agent Sheehan made a cursory examination of the inside of Goldstein's one room apartment to see if there was anyone else present (GS 37-38). Returning to the front of the room, Sheehan observed on a bookshelf, but did not then seize, a foil wrapped package (GX 3) identical to the one containing L.S.D. which Bachia had delivered to Nieves earlier that afternoon (GS 9-10, 38, 46, 57). At this point Sheehan holstered his pistol; Nieves had never drawn his (GS 31, 61-62).

Thereafter, Nieves advised Goldstein of his constitutional rights (GS 6, 36). Goldstein was then asked if he would agree to a search of his apartment. He asked Nieves if the agents had a warrant, and Nieves said they did not (GS 36). Goldstein said his main objection to such a search was that he would not be present when it occurred, but Nieves assured him that he would be allowed to be present (GS 11). Goldstein then signed a consent to search form, and the search occurred (GS 7; GX 1).*

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* The form reads:

CONSENT TO SEARCH

I, Marvin Goldstein having been informed of my constitutional right not to have a search made of the premises or vehicle hereafter described without a search warrant and of my right to refuse to consent to such a search, hereby authorize R. Palombo, and R. Nieves, (agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice), to conduct a complete search of the premises or vehicle under my control described as 56 E. 4th St. NYC.

This written permission is given by me voluntarily and without threats or promises of any kind being made to me.

The agents seized the aluminum foil package (GX 3) Sheehan and Nieves had earlier observed and which was found to contain 4,000 doses of L.S.D. (GS 7). The search also revealed, under Goldstein's mattress, the Government money the agents had previously paid Bachia for the L.S.D. Goldstein had furnished Bachia (GS 12).

At the conclusion of the hearing Judge Pollack denied the motion:

> "It has been clearly and convincingly shown that there was ample probable cause for an arrest, and the consent to search given by the defendant Goldstein was, in fact, voluntarily given, and the search was reasonably conducted within permissible areas and was not the result of duress or coercion, express or implied, or beyond the reasonable limits of a proper search" (GS 67-68).

C. The Arrest of Goldstein Was Legal

Goldstein argues that there was no probable cause to arrest him and even if there were, the agents needed an arrest warrant. Both these contentions are inconsistent with the facts and the law.

There certainly was sufficient probable cause for the agents to arrest the defendant here. Bachia's possession of a large quantity of L.S.D., his statement to Nieves that his "connection" for the L.S.D. lived at 56 East 4th Street, Sheehan's observation of Bachia leaving this address immediately before Bachia's arrest in possession of the 10,000 dots of L.S.D., Bachia's leading of the agents back to 56 East 4th Street, where he said his connection was, the fact that Goldstein fit the description of his connection which Bachia had earlier given Nieves and Goldstein's resistance of his arrest after Nieves announced that he was a federal officer, all support the Government's position that there was more than a probability that Goldstein was indeed the source of the L.S.D.

Goldstein's argument that the agents lacked probable cause to arrest him is premised not so much on the insufficiency of what Bachia told them as it is on the notion that Bachia's reliability as an informant was not established and that the agents could therefore not rely on what he said. The answer to this contention is that the agents had ample corroboration of Bachia's information and were therefore entitled to act on it. *United States* v. *Manning*, 448 F.2d 992, 997-1002 (2d Cir.) (in banc), *cert. denied*, 404 U.S. 995 (1971). Bachia had been arrested minutes before with a substantial quantity of L.S.D. for delivery to undercover agents acting as purchasers whom he had taken to the block where he said his connection lived. After his arrest, he said that his connection was at 56 East 4th Street, and he had been observed by surveillance agents leaving that address a few minutes before he delivered the L.S.D. to the undercover agents. Moreover, Bachia's information had substantial reliability because it concerned a criminal activity in which he was directly involved, thus establishing that his knowledge was first-hand and contrary to his penal interest, since his identification of his connection implicated Bachia criminally and carried with it the risk that the connection, once apprehended, could give the agents information implicating Bachia. *United States* v. *Harris*, 403 U.S. 573 (1971). Finally, since Bachia had just been arrested for a very serious crime and was seeking to help himself by cooperating with the agents, he was hardly in the position of wanting to mislead them by giving them false or inaccurate information. *United States* v. *Carter*, 498 F.2d 83, 85 (D.C. Cir. 1974).*

Goldstein's point that, despite their probable cause, the agents were required to obtain an arrest warrant is devoid

* Moreover, assuming, *arguendo*, that Nieves had insufficient reason to arrest Goldstein based on the foregoing facts, he certainly had sufficient cause to arrest him when Goldstein assaulted him by slamming the door on his hand. Title 18, U.S.C. § 111.

of merit. Neither statutory law or the Fourth Amendment required the agents to leave the area and secure a warrant for an arrest in the late afternoon, particularly since, given his pre-arranged rendezvous with Bachia after the sale, Goldstein would have been immediately alerted that Bachia had been arrested. *United States* v. *Gonzalez*, 483 F.2d 223, 224-225 & n.2 (2d Cir. 1973); 21 U.S.C. § 878(3).

D. The search of Goldstein's apartment was legal.

Goldstein alleges that his consent to the search of his apartment was void because it was involuntray. Goldstein points to the fact that he was arrested by agents with drawn guns with whom he scuffled, and because, according to his brief (at 29) ". . . he was told by the agents that they intended to get a warrant and that if they did, he wouldn't be present for the search. . . . Appellant had demanded a search warrant and didn't accede to the search until the agents, who were already making initial cursory search maneuvers, indicated that their getting one was a formality and he couldn't be present for the search if they took the time to get one." This argument, in no way based on the testimony at the suppression hearing, appears to rest on a distorted analysis on trial testimony by Agent Palombo.* The testimony at the hearing and at trial, how-

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* "A few minutes thereafter I obtained a consent to search the premises from Mr. Goldstein. He asked me if I had a search warrant. I told him I didn't, but that I had intended on getting one.

He said, 'Would it be possible for me to be present when you got the search warrant.'

I told told him it would be highly unlikely because it would take a long time to obtain a search warrant from the court.

He said, 'In that case, I don't want anybody searching my apartment without me being present. I will sign the consent to search form.' He did so." (400-401).

We submit that, since the motion to suppress was not renewed after Palombo's testimony nor objection taken to the ad-

[Footnote continued on following page]

ever, fully supports Judge Pollack's holding and in no way supports Goldstein's claims. Indeed, we submit that while Goldstein was not required to do so, his failure to support his own motion by his own testimony, when the issue was his state of mind, properly permits the drawing of the most adverse inferences reasonable against him. *Cf. United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3208 (October 15, 1974).

The voluntariness of a consent to search "is a question of fact to be determined from all the circumstances . . ." *Schneckloth* v. *Bustamante*, 412 U.S. 218, 248-249 (1973).

> "[T]he mere fact that a suspect is under arrest does not negate the possibility of a voluntary consent."

United States ex rel. Lundergan v. *McMann*, 417 F.2d 519, 521 (2d Cir. 1969); *see United States* v. *Faruolo*, Dkt. No. 74-1350 (2d Cir., October 29, 1974); *United States* v. *Candella*, 469 F.2d 173, 174-75 (2d Cir. 1972); *United States* v. *Ellis*, 461 F.2d 962, 967-68 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Bracer*, 342 F.2d 522 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); *United States* v. *Kohn*, 365 F. Supp. 1031 (E.D.N.Y. 1973), *aff'd on the opinion below*, 495 F.2d 763 (2d Cir. 1974). In this case, before he was asked to consent to the search, Goldstein was given a complete *Miranda* warning.* See *United States* v.

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mission of this evidence when offered or thereafter, Palombo's testimony should not be considered in reviewing Judge Pollack's ruling on the suppression motion, despite the general rule to the contrary articulated in *United States* v. *Canseio*, 470 F.2d 1224 (2d Cir. 1972).

* In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), the Supreme Court specifically declined to decide whether the defendant must be given a *Miranda* warning before his consent to a search is sought when he is in custody. The Court did, however,

[Footnote continued on following page]

Faruolo, supra; Gorman v. *United States*, 380 F.2d 158, 163-65 (1st Cir. 1967); *cf. United States* v. *Mapp*, 476 F.2d 67, 78 fn. 13 (2d Cir. 1973); *United States* v. *Ellis, supra*, 461 F.2d at 962, 967. The consent to search form he signed stated that he did not have to consent to the search.* *See United States* v. *Faruolo, supra*, slip op. at 5831-34; *United States* v. *Savage*, 459 F.2d 60, 61 (5th Cir. 1972), *cert. denied*, 415 U.S. 949 (1974); *United States* v. *Fernandez*, 456 F.2d 638, 640 (2d Cir. 1972); *United States ex rel. Gockley* v. *Myers*, 378 F.2d 398, 399-400 (3d Cir. 1967); *United States* v. *Bracer, supra*, 342 F.2d at 524-25; *United States* v. *Kohn, supra*. Goldstein had inquired whether the agents had a search warrant and been told that they did not. See *United States* v. *Kohn, supra*, 365 F. Supp. at 1034. Moreover, far from being told that getting a search warrant was a formality (Goldstein Br. at 29), Goldstein was simply told that Palombo "had intended on getting one." (400). *United States* v. *Faruolo, supra*, slip op. at 5831-5834.** Furthermore, contrary to his assertions (Br.

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imply that the giving of *Miranda* warnings to a defendant prior to obtaining his consent was an important factor in establishing the voluntariness of the consent. Goldstein's reliance upon *United States* v. *Mapp*, 476 F.2d 67 (2d Cir. 1973), is misplaced. There, this Court found that, upon the particular circumstances of that case, where "the agents [did not] take at least some minimal action designed to purge the situation of its coercive pressures," *id.* at 78, the in-custody consent to search was not voluntary. One of the measures the agents did not take—upon which this Court places heavy reliance—was to inform the individual in any manner of any of her rights before obtaining her consent. Moreover, none of the factors found coercive in *Mapp* are present here.

* This is not a case where the defendant was told by the agents that they would search at the time whether he consented or not. *See Bumper* v. *North Carolina*, 391 U.S. 543, 546-50 (1968); *United States ex rel. Lundergan* v. *McMann, supra*, 417 F.2d at 521.

** It should be noted that the agents were reasonable in their belief that a search warrant of Goldstein's apartment could be

[Footnote continued on following page]

at 29), Goldstein was not told that he could not be present during the search unless he consented to a warrantless search. Rather, he was told—and quite accurately—that it was "highly unlikely" that he could ". . . be present when [the agents] got the search warrant." (400). Finally, although Sheehan did have his gun drawn when he entered Goldstein's apartment, he put it away almost immediately and a number of minutes before Goldstein was asked to consent to the search. Compare *United States* v. *Faruolo, supra,* slip op. at 5829.

Thus, there is simply nothing in the record on which any substantial attack can be made upon Judge Pollack's findings, made after an evidentiary hearing, that Goldstein voluntarily consented to the search of his apartment, particularly since such a finding should not lightly be overturned. *United States* v. *Bracer, supra,* 342 F.2d at 525. But even if Goldstein's consent was involuntary, that would be an insufficient basis upon which to suppress the evidence. As one court stated:

> "If the police have overreached and obtained oral admissions, they have received something they otherwise would not have. As to a search, on the other hand, if the only result of the apparent consent is a premature search, suppressing the evidence because of police reliance on a faulty consent has the effect

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obtained upon the basis of Bachia's statement to them that he had gotten the 10,000 dots of L.S.D. from Goldstein at Goldstein's apartment, Sheehan's observation, which totally corroborated Bachia, of Bachia's departure from the apartment shortly before Bachia was arrested in possession of the 10,000 dots, and their observation in the apartment in plain view of a rectangular package of aluminum foil, which was identical with the package of 1800 dots of L.S.D. they received from Bachia earlier in the day and the package containing 10,000 dots of L.S.D. they had just seized from Bachia. See *United States* v. *Faruolo, supra,* slip op. at 5832. Indeed, having seen the package in plain view from a place where the agents were entitled to be, they were entitled to seize it without either a warrant or Goldstein's consent.

> of suppressing for all time what, but for misplaced reliances on an apparent consent, the police would have been entitled to find later. [This] calls for what might seem a highly disproportionate penalty upon the state under such circumstances." *Leavitt* v. *Howard*, 462 F.2d 992, 998 (1st Cir.), *cert. denied*, 409 U.S. 884 (1972).

Cf. United States v. *Messina*, Dkt. No. 74-2066 (2d Cir., December 10, 1974), slip op. 670-671.

POINT II

The trial court correctly found that Joseph Wenzler voluntarily consented to a search of his apartment.

On February 12, 1974, Special Agent Nieves, having previously purchased 4000 tablets of L.S.D. from Joseph Wenzler at the same premises, conducted surveillance at 416 East 9th Street (WS 3).* About 8:30 Nieves saw Wenzler enter this building, followed him inside, and, after identifying himself to Wenzler, placed Wenzler under arrest. At the time of arrest Wenzler was on the staircase landing leading to his apartment and about to go inside (WS 4). Nieves was joined shortly by fellow agent Kieran Kobell and Group Supervisor Frank White (WS 4). As the agents were about to handcuff Wenzler, a noise was heard above as people started to descend the staircase, and Wenzler asked that he be allowed to step inside so as to avoid embarrassment. This was done (WS 5-6, 30, 58). Upon entering Wenzler's one room apartment Special Agent Nieves advised Wenzler of his constitutional rights. Wenzler said, "I'm fully aware what my rights are" (WS 6, 12, 32). Nieves then suggested he knew he would find

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* The references to (WS) in the text relate to the Wenzler Suppression Hearing.

narcotics if he looked for them. Wenzler replied that anything found would be strictly for his own personal use (WS 7). When asked by Agent Kobell where the narcotics were, Wenzler pointed to a night table drawer. Kobell asked if he could look in this drawer, and Wenzler replied "yeah, go ahead." * Seized from this drawer, among other things, were 295 tablets of purple haze L.S.D. (GX 21) of the same type Wenzler sold to Nieves on January 15, 1974 (WS 8-9, 39, 42-3, 59). Additional amounts of narcotics were seized that were not introduced at trial (WS 71-2). The time the agents were in the apartment was thirty minutes (WS 30, 80). The apartment was left in a neat condition (WS 74).

Wenzler in his moving papers alleged that the agents all displayed guns, that he was physically brutalized by the agents, that his apartment was made a shambles and that he was never informed of his rights. (Wenzler Affidavit in support of motion to suppress, Page 2). On cross-examination, Wenzler contradicted his affidavit, admitting that he had not seen whether any agents had guns drawn and that he did not read his moving affidavit but just looked it over (WS 100-105). Wenzler conceded that he had never previously told anyone that the apartment was a shambles, or seen a doctor for alleged physical ills, or told an Assistant United States Attorney that he had been assaulted (WS 105-107). Wenzler admitted he knew *Miranda* rights from reading them at college.** Wenzler admitted asking

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* It is significant to note here that Nieves also arrested Brandt and Miley while they were in their store (368-369). Brandt and Miley did not consent to a search and the premises were not searched. Also, Nieves arrested the defendant Vavarigos in the street and then went to his apartment; no consent was gotten to search, and no search was made (368-369).

** No consent to search form was signed by Wenzler because the agents neglected to have one in their possession at the time (321).

agents to conceal his arrest from the passers-by on the stairs and admitted that upon entering his apartment he recognized Nieves as the person to whom he had sold drugs to on January 15, 1974 (WS 115). Wenzler also admitted that when the purple haze was taken out of drawer he knew it was L.S.D. but told the agents to have it analyzed (WS 115). Counsel for Wenzler admitted there was probable cause for Wenzler's arrest (WS 127).

Judge Pollack found Wenzler's version of the events simply not worthy of belief. *United States* v. *Fernandez*, *supra*, 456 F.2d at 640. Looking at the totality of the circumstances, *United States* v. *Mapp*, *supra*, 476 F.2d at 78, Judge Pollack specifically found that was no coercion by expiicit or implicit means and that Wenzler fully understood his *Miranda* rights (WS 136-7).* Under these circum-

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* Judge Pollack's complete ruling was as follows:

"The Court ordered a hearing and an evidentiary hearing has been had and has been concluded this day.

And due deliberation having been had thereon, the Court finds and decides that based on the evidence, including the demeanor evidence and evaluating all of the evidence and circumstances in the record, the Court finds that the government has amply sustained its burden of proof, that the defendant was arrested on sufficient probable cause, and that the defendant invited and consented to the entry into the apartment of the government agents and thereafter consented to the search which disclosed the contraband.

The agents were lawfully on the premises, having been invited to enter therein by the defendant Wenzler, who voluntarily led the agents to the place where the drugs were located in the apartment, pointing out the night table which he voluntarily consented could be searched by the agents, and their search yielded the contraband.

The consent that was given for the search was given by a 26, now a 27-year old college-educated person possessing an evident conscious, intelligent understanding of the circumstances on the occasion in question and of what he was doing.

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stances, Wenzler's consent to search was voluntary. See, *e.g., United States* v. *Faruolo, supra.*

Wenzler's argument, which appears to be that mere arrest exerts psychological coercion sufficient to vitiate a consent to search, is simply not tenable as a matter of law. See *e.g., United States ex rel. Lundergan* v. *McMann, supra; United States* v. *Faruolo, supra.* Judge Pollack's decision, rendered after he judged the credibility of the witnesses at the suppression hearing, should be upheld.

POINT III

The trial court did not commit error in failing to instruct on the issue of entrapment as requested by counsel for the defendant Wenzler.

Wenzler attacks his conviction on Count Five at the first trial (which ended otherwise as a mistrial on account of jury disagreement except for Miley's acquittal on one count) because Judge Pollack refused to give the jury an instruction on entrapment. Judge Pollack was clearly correct, and Wenzler's contrary contention is frivolous.

> And that consent was freely, if not rather casually given without coercion either by explicit or implicit means, and was not generated through implied threat or covert force, nor was there any involuntary submission to authority. There is no credible evidence of any inherently coercive tactics.
>
> The agents' testimony that they read to this defendant and explained his Miranda rights and that he knew all about them, that he stated that he knew all about them seems vindicated by the evidence on this hearing.
>
> The defendant's testimonial version of the arrest and the search are not worthy of belief, and indeed they pose substantial discrepancies from the sworn statement contained in the affidavit of the defendant of March 26th, 1974 in support of the motion to suppress." (WS-136-137).

The uncontradicted evidence on Count Five was that on January 4, 1974, Michael Starbuck, the informant, met Bill Brandt and Jan Lang at Brandt's apartment and discussed with them the delivery of an ounce of "purple haze" L.S.D. for $1800 (FT 76).* Starbuck received a sample of the "purple haze" which he turned over to Agent Palombo on January 15, 1974 (FT 76-7). Starbuck, Palombo and Nieves then met Brandt and Lang at Brandt's place of business at 160 First Avenue. Lang said that the deal—4000 doses for $1200—was ready to go but that he could only bring two people to his source; it was agreed Nieves and Palombo would meet the source (FT 78, 204-205, 387-388).

Agents Palombo and Nieves accompanied Lang to Apartment 5, 416 East 9th Street, where Lang introduced them to Joseph Wenzler (FT 205, 388). Wenzler said he wanted the money for the L.S.D. "fronted", but when Palombo and Nieves refused, Wenzler agreed to accept payment as delivery for the first 2000 tablets and to deliver the second 2000 tablets on the same terms if the first transaction went well (FT 206, 389). Wenzler left and returned about five or ten minutes later with 2000 purple tablets, for which Agent Palombo paid him $600 (FT 206, 389). Wenzler then left again and returned about five or ten minutes later with an additional 2000 purple tablets for which Agent Palombo paid him another $600 (FT 206, 389). Wenzler stated the acid was of good quality, and it was agreed that Palombo and Nieves would return in the future for larger quantities if sales went well. Wenzler requested he be given advance notice of any future larger order (FT 207, 275). Agents Palombo and Nieves then departed and returned to Brandt's place of business at 224 East 10th Street, where, in the presence of David

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* The references to (FT) in the text relate to the transcript of the first trial.

Miley and Michael Starbuck, Agent Palombo paid Brandt his $200 commission for arranging the deal (FT 207, 389-90). The total time spent in Wenzler's apartment was 25 minutes (FT 390, 492).

On cross-examination Starbuck stated he had only met Wenzler on two prior occasions, and that co-conspirators Brandt and Lang always operated as the middlemen in such narcotics negotiations (FT 96-107). On cross-examination Agent Nieves testified that the Government had not initiated the transaction with Wenzler, that the agents had never seen Wenzler prior to the sale, and that they had not informed Wenzler that it was imperative to get the "purple haze" or urged him to do so (FT 264, 272-3). Defense counsel elicited on cross-examination that Starbuck had been "bombarded" with offers to sell drugs by Brandt and his co-conspirators and that Starbuck was told by the agents not to encourage Brandt nor to use ingenuity in creating sales (FT 424, 430-2).

It is on the basis of this record, totally devoid of evidence to contradict defendant Wenzler's propensity to commit the crime or of Government inducement, that Wenzler claims the trial court committed error in not giving the jury an entrapment instruction. The trial court found the entrapment defense for Wenzler nothing more than "semantic contentions of counsel" (FT 572).

In order for a charge of entrapment to be given there must be some evidence that the Government implanted the criminal design in the mind of the defendant. *United States* v. *Russell*, 411 U.S. 423 (1973). The traditional test in this Circuit is bifurcated:

> "Two questions of fact arise:
>
> (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without per-

> suasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it."

United States v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (L. Hand, *J.*). While the defendant's burden of showing inducement is "relatively slight", *United States* v. *Henry*, 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970), he cannot establish inducement from the fact that his involvement arose from the actions of a co-conspirator, even though that co-conspirator may have been responding to the inducement of a Government agent or informant. *United States* v. [redacted], 461 F.2d 1001 (9th Cir. [redacted]); *United States* v. *Sanchez*, 440 F.2d 649 (9th Cir. 1971). *Cf. United States* v. *Conversano*, 412 F.2d 1143, 1148 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969). Here, assuming any inducement by the Government occurred, it was only directed to Brandt and possibly Lang but certainly not Wenzler. In so far as Wenzler was concerned, the agents merely held themselves out to him as willing purchasers and did no more than buy what Lang had already arranged with Wenzler to sell, which is insufficient to establish inducement. *United States* v. *McMillan*, 368 F.2d 810, 812 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); *United States* v. *Christopher*, 488 F.2d 849 (9th Cir. 1973); *Kibby* v. *United States*, 372 F.2d 598 (5th Cir. 1967).

Moreover, regardless of any question of inducement, the Government proved that when Wenzler met with the agents for the first time, he was fully prepared to go forward with the sale, negotiated its terms, promptly produced the 4000 tablets of L.S.D., extolled its quality, and made arrangements for further and larger purchases of L.S.D. by the agents. Since the Government thus established Wenzler's propensity by substantial and uncontradicted evidence, it was unnecessary for the question of

entrapment to go to the jury. *United States* v. *Gonzalez*, 460 F.2d 1286 (2d Cir. 1972); *United States* v. *Nieves*, 451 F.2d 836, 838 (2d Cir. 1971); *United States* v. *Greenberg*, 444 F.2d 369 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States* v. *Berger*, 433 F.2d 680 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971).

POINT IV

The defendant Goldstein received a fair trial.

Goldstein maintains that he was denied a fair trial by the conduct of the judge in questioning Agent Palombo on two occasions during his testimony. This argument is totally without merit.

In assessing the role of the trial court in a criminal matter, it is important to recognize that a judge is "more than a moderator or umpire." *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960). Indeed, he must insure that the facts are presented to the jury in a "clear and straightforward manner" while maintaining an appearance of "impartiality and judicious detachment" at all times. *United States* v. *Nazzaro*, 472 F.2d 302, 313 (2d Cir. 1973). Consequently, it is clear that a trial judge "should take an active part when necessary to clarify testimony and assist the jury in understanding the evidence." *United States* v. *Tyminski*, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970); *United States* v. *Cruz*, 455 F.2d 184 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972); *United States* v. *Switzer*, 252 F.2d 139, 144 (2d Cir.), *cert. denied*, 357 U.S. 922 (1958).

If an appellant's brief raises a question the trial court's fairness in conducting a trial, it is essential to review the entire transcript in order to ascertain the "true or complete picture of the framework for a background of the allegedly prejudicial comments. . ." *United States* v. *Weiss*, 491 F.2d

460, 468 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3209 (October 15, 1974). The few selected quotations lifted by counsel for Goldstein from a trial transcript of 769 pages not only fail to raise any issue as to the trial judge's fairness in conducting the trial but demonstrate how erroneous and grossly exaggerated the arguments are. Counsel for Goldstein has fastened on questioning by Judge Pollack in two brief instances as having deprived his client of a fair trial. A dispassionate review of the questioning reveals that when Special Agent Palombo was questioned by Judge Pollack about the apartment Goldstein was found in, his answers—that there was no name on either the door or bell of Goldstein's apartment—were harmful to the Government on whether the apartment was Goldstein's (334). As to the questioning regarding the $660 recovered from Goldstein's apartment (403), Nieves and Palombo had already testified to this earlier (230-232, 401). The Judge was merely clarifying the exact amount of serialized money recovered from the apartment. Any attempt to stretch these two brief instances within the context of this record to the stature claimed by counsel for Goldstein is legal nonsense.

POINT V

The jury properly found a single conspiracy.

Each of the appellants, though with some variation in analysis, makes the claim that the evidence was insufficient to establish a single conspiracy of which each was a member. We respectfully submit that, to the contrary, the evidence establishes a single conspiracy, consisting of Brandt and Miley as the core group acting for the agents as "finders" and each of the other defendants acting as a middleman or supplier/"connection" to the agents introduced to them by Brandt and Miley. While these middlemen and connections were not shown to have known each other personally, each of them dealt, directly or sometimes in-

directly, with Brandt and Miley during a relatively brief period in the sale of various types of non-narcotic hallucinogenic substances. The circumstances of these transactions establish that each of the co-conspirators had every reason to be aware that he was participating in an ongoing conspiracy to traffic in hallucinogenic substances of which he could only have been one of a number of suppliers.

A. The Evidence

The events proven originated from discussions held with Brandt and Miley by Michael Starbuck, an informant, regarding the purchase of various illicit substances. On November 23, 1973, Brandt and Miley arranged with Starbuck to sell 1000 units of L.S.D. to be delivered by John Godinsky (40). On November 27, 1973, Godinsky delivered the L.S.D. to Agent Nieves at the apartment of Brandt and Miley, who were present, as was Starbuck. Brandt took Nieves' money, retaining the lion's share. Brandt, Miley and Godinsky extolled the quality of their L.S.D., and Brandt quoted Nieves a price list for larger L.S.D. purchases in the future. Significantly, at this same meeting, Brandt raised, and Nieves agreed to consider, the possibility of Nieves' purchasing ounce quantities of T.H.C. (42-43, 186-188).

On December 5, 1973, Lang, Brandt and informant Starbuck met and discussed the sale of T.H.C. Lang furnished a sample of the T.H.C., and the purchase of one ounce for $1800 was agreed to. That purchase by Nieves, Palombo and Starbuck—of an ounce of what purported to be T.H.C. for $1800—took place a week later at David Flores' apartment in the presence of Agent Nieves, Brandt, Flores, and Vavarigos. Brandt and Flores split the agents' $1800, and Vavarigos discussed the methods of diluting and packaging the T.H.C., stating that 3000 doses could be made from the ounce the agents had bought (46-48, 193-199, 376).

Vavarigos was visited four days later by Starbuck, accompanied by Miley on Brandt's instructions, to discuss a proposed ⅛ or ¼ pound cocaine purchase. Vavarigos furnished a sample of the cocaine to Starbuck (50-51).*

On January 3, 1974, after being informed by Brandt by telephone that he had 3850 doses of L.S.D. available, Agents Nieves and Palombo went to the apartment of Brandt and Miley, where they met Godinsky and Miley. Godinsky delivered and was paid for the 1350 dots of L.S.D. and left to get the rest. The agents went away briefly, returning to find only Miley, who said that Brandt was out and that Godinsky would call if he had obtained the remaining 2500 dots of L.S.D. Shortly thereafter Brandt turned up, Godinsky telephoned and later reappeared with the remaining 2500 units of L.S.D., for which Nieves paid Brandt $1250. Brandt told Nieves that Godinsky was going to California and thereafter Nieves was to deal with Bachia a/k/a Strider, Godinsky's supplier (204-206, 382-384).

The next day Brandt and informant Starbuck met with Lang and discussed the purchase, for $1800 an ounce, of "purple haze" L.S.D., of which Lang furnished a sample.

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* Thereafter, there were a number of telephone conversations and meetings between Vavarigos and the agents which ended with Vavarigos' inability to come up with the cocaine but did result in his furnishing of a further sample of the alleged T.H.C. to the agents with the request that they try to find buyers (GX 7A, 15A and 16A; 207-211, 389).

Vavarigos' participation with Brandt and Flores in the sale of what purported to be T.H.C., his discussion of its dilution and packaging, his subsequent negotiations with Starbuck, Miley and the agents to sell cocaine, of which he furnished a sample, and his request that the agents assist him in selling further quantities of the purported T.H.C. deprives his claim under the "single act" or "isolated transaction" doctrine, *e.g.*, *United States* v. *Torres*, 503 F.2d 1120, 1123-1124 (2d Cir. 1974), *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971), of any force whatsoever.

Eleven days later, on January 15, 1974, Nieves and Palombo were introduced to Lang in Brandt's presence. Lang then took them to Wenzler, his "connection", who agreed to terms for the deal, delivered and was paid for 4000 doses of L.S.D., and discussed further transactions in the future. The agents returned to Brandt and Miley, and in Miley's presence, paid Brandt a commission for the transaction (214-217, 390-392).

The final transaction was arranged with the agents by Brandt in Miley's presence on February 6, 1974, and involved the delivery by Bachia for $16,500 of 50,000 doses of L.S.D. from the same source Godinsky had used. On February 12, 1974, the agents again met with Brandt and Miley. Miley said that he and Brandt were opening a new store on the proceeds of their previous L.S.D. transactions. Bachia appeared, made a partial delivery of 1800 dots of L.S.D. and was paid for it, then took the agents downtown and picked up 10,000 more units from Goldstein, later telling the agents that his "source" had already sold the other 40,000 doses. Bachia was arrested, as was Goldstein shortly thereafter. A search of Goldstein's apartment disclosed the money the agents had given Bachia earlier in the day and 4000 more units of L.S.D. packaged like the 10,000 units seized on Bachia's arrest and containing the same type of L.S.D. as Bachia's 10,000 units and the L.S.D. Godinsky had previously furnished (183, 190, 207, 220-230, 234, 236, 393-402). When Wenzler was arrested later that day, a search of his night table revealed "purple haze" L.S.D. of the type previously sold by Wenzler to the agents and furnished by Lang in sample form during the negotiations (217, 237-240, 509).

B. The Single Conspiracy

The foregoing establishes that in virtually every transaction in which the agents and Starbuck participated from November, 1973 through January, 1974, Brandt and Miley

were the moving force. Brandt and Miley together negotiated the November 27 purchase by Nieves of L.S.D. from Godinsky, both were present when delivery by Godinsky and payment by Nieves were made, and both extolled the quality of Godinsky's L.S.D. Similarly, when the agents made their second purchase of 3850 units from Godinsky on January 3, 1974, both actively participated in arranging the details of the purchase. Brandt collected money for both transactions. Further, Miley was a participant in the conversations between Brandt and the agents which led to the abortive 50,000 dose L.S.D. sale to the agents by Bachia and Goldstein.

While the evidence only established directly the participation of Brandt and not of Miley in setting up the T.H.C. transaction with Lang, Flores and Vavarigos and the "purple haze" deal with Lang and Wenzler, it is clear that Miley was fully aware of them, for he was present when Brandt was paid for arranging the "purple haze" transaction, and four days after the T.H.C. sale, Miley took Starbuck, the informant, to Vavarigos, who had been intimately involved in the T.H.C. sale, to discuss the sale of cocaine. Any doubt of the wholehearted participation of Miley in all the drug deals he and Brandt put together is dispelled by his close personal and business relationship with Brandt and his statement on February 12, 1974, that he and Brandt were financing the opening of their new store on the proceeds of their L.S.D. transactions. See *e.g.*, *United States* v. *Santana*, 503 F.2d 710, 713-714 (2d Cir. 1974); *United States* v. *Cirillo*, 499 F.2d 872, 883 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3331 (December 9, 1974); *United States* v. *Arroyo*, 494 F.2d 1316, 1319 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3208 (October 9, 1974); *United States* *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); *United States* v. *Ruiz*, 477 F.2d 918 (2d

Cir.), *cert. denied,* 414 U.S. 1004 (1973); *United States* v. *Vega,* 458 F.2d 1234, 1237 (2d Cir. 1972), *cert. denied,* 410 U.S. 982 (1973); *United States* v. *Cobb,* 446 F.2d 1174, 1176-1177 (2d Cir. 1971).

Given the proof of a single conspiracy the core members of which knew of, arranged for, participated in and profited from every transaction involved, the law has been settled in this Circuit at least since *United States* v. *Tramaglino,* 197 F.2d 928 (2d Cir.), *cert. denied,* 344 U.S. 864 (1952), that others who join the conspiracy even for limited purposes and limited periods of time are properly chargeable as co-conspirators so long as each is aware ". . . of others in the line of distribution and of the larger nature of the operation of which he . . . played a part." *United States* v. *Sperling,* Dkt. No. 73-2363 (2d Cir., October 10, 1974), slip op. at 5664, quoting *United States* v. *Calabro,* 467 F.2d 973, 982-983 (2d Cir. 1972), *cert. denied,* 410 U.S. 926 (1973): See also *United States* v. *Sisca,* 503 F.2d 1337, 1345 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3281 (November 11, 1974); *United States* v. *Bynum,* 485 F.2d 490, 495 (2d Cir. 1973); *vacated on other grounds,* 417 U.S. 903 (1974). Sufficient proof can be found in the record to sustain the jury's verdict as to each defendant.

First, Vavarigos, Flores, Goldstein and Wenzler each participated directly and in person in sales of drugs in wholesale quantities. Vavarigos and Flores sold an ounce of what was supposed to be T.H.C., and during the sale Vavarigos expressly pointed out that the T.H.C. could produce 3000 doses. Similarly, Goldstein was directly involved, through Bachia and Godinsky and later through Bachia alone, in selling some 6800 doses of L.S.D. to the agents, delivering 10,000 more doses through Bachia on February 12, and contracting for 40,000 more doses that were never delivered because they had already been sold

by Goldstein.* Wenzler, after furnishing a sample through Lang, sold 4000 doses of "purple haze" to the agents directly.

Second, each of the supplier groups (Vavarigos-Flores-Lang, Wenzler-Lang, Goldstein-Bachia-Godinsky) either completed more than one sale to the agents or intended more than one. The Goldstein-Bachia-Godinsky group, as noted, made substantial L.S.D. deliveries through Brandt and Miley, and would have sold even more. Wenzler, when

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* Goldstein contends there is insufficient evidence to connect him with the L.S.D. delivered on the first two occasions by Godinsky. The contention is absurd. The L.S.D was delivered by Godinsky, whose connection was Bachia, who made the 50,000 dose deal with the agents and effected partial delivery before his arrest. On the night of January 3, 1974, after delivering 3850 doses of L.S.D., Godinsky was observed leaving from the hotel where Brandt and Miley lived accompanied by Bachia, who went immediately to the very block where Goldstein lived. Moreover, Brandt told the agents that the L.S.D. in the 50,000 dose deal came from the same source as Godinsky's earlier deliveries, which was confirmed by laboratory analysis showing the L.S.D. in all three deliveries to be of the same type. Just before the 10,000 dose delivery, Bachia went to Goldstein's apartment, and on Goldstein's arrest, 4000 more doses of the same L.S.D. were found there. The money the agents had given to Bachia was found under the mattress by the agents after Goldstein told them where it was (400-401).

Given this evidence, there was more than enough non-hearsay proof against Goldstein to permit introduction of co-conspirator's declarations, *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir. 1974), *cert. denied*, 43 U S.L.W. 3208 (October 9, 1974), and to sustain the jury's verdict. *E.g.*, *United States* v. *Rizzuto*, Dkt. No. 74-1724 (2d Cir., October 9, 1974); *United States* v. *Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Barrera*, 486 F.2d 333, 337-338 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States* v. *Marrapese, supra; United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Cuomo*, 479 F.2d 688, 694-695 (2d Cir.), *cert. denied*, 414 U S. 1002 (1973).

selling the 4000 doses of "purple haze" L.S.D., agreed to make additional sales. Vavarigos and Flores made a sale of enough supposed T.H.C. to produce 3000 doses, and Vavarigos later engaged in protracted negotiations with Miley, Starbuck, and the agents to sell cocaine, a deal in which Vavarigos made clear that Flores was involved (GX 7A). Moreover, Vavarigos, when unable to deliver the cocaine, gave the agents more of what he believed was T.H.C. and asked them to find customers.

Third, all of the complaining defendants except Goldstein dealt directly with the agents after introductions by Brandt and Miley either to them directly or through Lang. Their willingness to do so bespoke of some knowledge of the agents' prior activities with Brandt and Miley, for it was hardly likely that such hardened dealers as Vavarigos, Flores and Wenzler would deal with the agents face-to-face without vouching by Brandt and/or Miley that prior transactions with Starbuck, Nieves and Palombo had been successful and uneventful. Indeed, Flores and Vavarigos insisted on such a testimonial before agreeing to let Nieves upstairs to Flores' apartment (47-48).

Fourth, and perhaps most important, there was substantial evidence that each of the supplying groups had every reason to know of each other's existence. First, as noted, each group was selling large quantities of hallucinogenic drugs to Palombo and Nieves, who could only have appeared as substantial wholesalers unlikely to deal in only one drug from only one source. Indeed, Godinsky knew that Brandt and Miley were doing other business with the agents because Brandt specifically discussed the sale of T.H.C.—later provided by the Lang-Flores-Vavarigos group—in Godinsky's presence after his delivery of 1000 doses of L.S.D. on November 27. Secondly, the entree for Brandt, Miley and the agents to both Vavarigos and Flores (T.H.C.) and to Wenzler ("purple haze" L.S.D.) was provided by the same individual, Lang.

Finally, it should, of course, be noted that all of the events here took place within a brief period of time on the lower east side of Manhattan and involved the sales of similar hallucinogenic substances. *United States* v. *Mallah*, 503 F.2d 971, 986 (2d Cir. 1974).

The net of the matter is that on this evidence, none of which was contradicted by the defense, the jury was entitled to find a single conspiracy under Judge Pollack's unexceptionable and thorough charge on the issue, a charge approved in substantially *verbatim* form in *United States* v. *Bynum, supra,* 485 F.2d at 497-498, and *United States* v. *Sperling, supra,* slip op. at 5666. "While some of the suppliers may not have known the identity of other sellers, the inference was justified that each knew his supplies were only a small part of the . . . drugs . . ." the Brandt-Miley core group was assisting the agents in procuring. *United States* v. *Bynum, supra,* 485 F.2d at 497 ". . . [W]here two or more chains are connected to a hub by core conspirators, this court has not hesitated to view the entirety as a single conspiracy. *Bynum; Arroyo; Sisca.*" *United States* v. *Mallah, supra,* 503 F.2d at 984. The fact that there were distinctions in the type of drug each supplier sold is irrelevant. *United States* v. *Mallah, supra,* 503 F.2d at 976.

Moreover, even if more than one conspiracy was shown by the proof despite the trial judge's correct instructions and the jury's finding, there is still no reason to reverse the convictions here, for the appellants have made no showing of prejudice. *United States* v. *Calabro, supra,* 467 F.2d at 983; *United States* v. *Vega, supra,* 458 F.2d at 1236; *United States* v. *Agueci,* 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963). While vague claims are made of the admission of hearsay said to be prejudicial, the record establishes that no hearsay implicating any defendant was admitted that would not have been equally admissible and damaging had the conspiracy charged against him been

more narrowly defined. Nor was any transaction proved at trial as to some defendants so disparate or inflammatory as to prejudice the other conspirator-defendants who did not participate in it; each was involved in transactions in like quantities of similar drugs. Finally, none of the other possibilities of prejudice suggested by *United States* v. *Calabro, supra,* 467 F.2d at 983, exists in this case.

As to severance, since only one conspiracy was proven, it is clear that a severance was not required. *United States* v. *Sperling, supra,* slip op. 5667-5668; *United States* v. *Bynum,* 485 F.2d at 497-498. Moreover, even if more than one conspiracy was shown by the evidence, no severance was necessary. *Blumenthal* v. *United States,* 332 U.S. 539, 559-560 (1947); *United States* v. *Agueci, supra,* 310 F.2d at 827.

Finally, even assuming that the convictions of the appellants on the conspiracy count must be reversed, no reversal is necessary on the substantive counts on which they were convicted. *United States* v. *Sperling, supra,* slip op. at 5669. Goldstein's claim that he was prejudiced by a *Pinkerton* charge is disposed of by *United States* v. *Sperling, supra,* 5666-5667, 5670 & n.29. Here no defendant was charged in a substantive count except as to drugs which the evidence showed he either physically possessed or distributed or both. Goldstein further claims that the application of *Pinkerton* to the 4000 doses of L.S.D. found in his apartment was uniquely prejudicial is disposed of not only by *Sperling* but also by the fact that he was charged not with a conspiracy limited to sales to the agents but rather with a conspiracy to sell drugs generally. *Cf. United States* v. *Floyd,* 496 F.2d 982, 987 (2d Cir. 1974).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1974— 614—209—445

HCB,Jr.:am

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

-v- :

WILLIAM BRANDT, et al., :

Defendant. :

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24th day of December 1974 he served ~~a~~ 2 copies ~~copy~~ of the within Governments' brief by placing the same in properly postpaid franked envelopes addressed as follows:

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51 Chambers Street
New York, N. Y.

HCB,Jr.:am

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325 Broadway,
New York, N. Y.

And deponent further says that he sealed the said envelopes and placed the same in the mail ~~chute drop~~ box for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

JOHN D. GORDAN III

Sworn to before me this
24th day of December, 1974.

LAWRENCE S. FELD
Notary Public, State of New York
No. 31-6259352
Qualified in New York County
Commission Expires March 30, 1976